No. 91-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PENTHOUSE INTERNATIONAL, LTD.,

Petitioner,

against

EDWIN MEESE III, Attorney General of the United States, HENRY E. HUDSON, DR. JUDITH VERONICA BECKER, DIANE D. CUSACK, PARK ELLIOTT DIETZ, JAMES C. DOBSON, EDWARD J. GARCIA, ELLEN LEVINE, HAROLD (TEX) LEZAR, REV. BRUCE RITTER, FREDERICK SCHAUER and DEANNE TILTON-DURFEE, Members of the Attorney General's Commission on Pornography, and ALAN EDWARD SEARS, Executive Director of the Attorney General's Commission on Pornography,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, THE FREEDOM TO READ FOUNDATION, INDEPENDENT VIDEO RETAILERS ASSOCIATION, NATIONAL ASSOCIATION OF COLLEGE STORES, INC., PERIODICAL AND BOOK ASSOCIATION OF AMERICA, AND RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. AS *AMICI CURIAE*, IN SUPPORT OF PETITIONER.

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STATEMENT

The Council for Periodical Distributors Associations, The Freedom to Read Foundation, Independent Video Retailers Association, National Association of College Stores, Inc., Periodical and Book Association of America, and Recording Industry Association of America, Inc.[1] submit this joint brief, *amici curiae*, urging reversal of the decision below. The brief is submitted upon the written consents of counsel to both petitioner and respondents, which are submitted herewith.

THE *AMICI*

Amici's members publish, produce, distribute and sell books, magazines, recordings and other communicative materials of all types, including those which are scholarly, literary, scientific and entertaining. As mainstream distributors and booksellers who distribute and sell popular, literary, scientific and scholarly books and periodicals, *amici* have a significant interest in the resolution of the issue before the Court. *Amici*'s members do not own what are commonly referred to as "adult" stores; nor do they distribute "adult" materials normally found in such stores. *Amici*'s members do, however, distribute and sell mainstream materials which, while not obscene, contain sexually frank matter or other matter that certain persons may find objectionable.

The Council for Periodical Distributors Associations is the national trade association for approximately 400 independent local wholesale distributors who distribute over ninety-five percent of all magazines, comic books, paperback books and newspapers in every state of the United States.

The Freedom to Read Foundation, a non-profit membership organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein

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[1] The *amicus curiae* organizations, together with their respective members, are referred to collectively as "*amici*."

every citizen's First Amendment freedoms are fulfilled; to support the rights of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

The Independent Video Retailers Association is a membership organization whose more than 3,000 members own and operate more than 4,300 general interest, full-service video stores in communities throughout the United States.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,850 college stores located throughout the United States.

The Periodical and Book Association of America is an association of magazine and paperback book publishers who rely on newsstand sales and who distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada.

The Recording Industry Association of America, Inc. ("RIAA") is a not-for-profit corporation whose member companies create and produce sound recordings and manufacture and distribute phonorecords. The members of the RIAA account for approximately ninety-five percent of all authorized phonorecords produced, manufactured and sold in the United States, including longplaying records, cassette tapes and compact discs. The RIAA and its members have a continuing commitment to preserving the freedom of artists to create musical works of interest to all segments of the public.

INTEREST OF THE *AMICI*

Amici have a continuing interest in the decisions of this Court balancing First Amendment rights and restrictions on material with sexual content. *Amici*'s brief will demonstrate how the legal principles involved in this case affect mainstream publishers, producers, distributors and retailers who publish, produce, distribute and sell popular, literary, scientific and scholarly books and periodicals and recordings that contain sexual content but are not obscene.

This case presents the issue of whether it is constitutional for government officials to send letters on official Justice Department stationery threatening to blacklist and publicly stigmatize mainstream retailers and wholesalers as pornographers, and implying that prosecution might follow unless they cease distributing materials which are not obscene and are clearly protected by the First Amendment. The Court of Appeals characterized this issue as one of "first impression" which this Court has been reluctant to decide, and held that, in the absence of an explicitly stated threat of criminal prosecution, the actions of the officials were constitutional.

This is not, however, a case of first impression. This Court and the federal courts generally have not been reluctant to confront this type of governmental misconduct and label it unconstitutional. Neither the government nor the court below has presented any compelling rationale to distinguish this case from *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), which found such conduct to be "censorship effectuated by extralegal sanctions," and held it plainly unconstitutional. 372 U.S. at 72. Nor is there any compelling rationale to severely limit the holding of *Bantam Books* after almost three decades of providing a clearly understood shield against extralegal governmental suppression of First Amendment freedoms. *Amici* are deeply concerned about the inroad made by the decision below on the *Bantam Books* doctrine.

The privately communicated threats by a government commission to "identify" and publicly denounce as pornographers mainstream companies not involved in the pornography business intimidate retailers and others dealing with the public as effectively as direct threats of prosecution. When made with the intent of crippling concededly protected expression, they are every bit as unconstitutional. Moreover, when these threats emanate from prosecutorial or law enforcement agencies as they did here, they suggest that prosecution is imminent.

The threats made by the Commission in this case were as efficacious as a direct threat of prosecution. Southland Corporation (7-Eleven Stores), Rite Aid Drug Stores, Revco, Thrifty Drug, Dart Drug and other retailers and wholesalers discontinued distribution of petitioner's *Penthouse* magazine after receipt of the letters. Yet none

of the issues of *Penthouse* discontinued by distributors following the Commission's threats has ever been found by any court to be obscene.

Amici's members regularly face similar governmental misconduct and often are compelled to seek redress from the courts. *Bantam Books* and its progeny have allowed *amici*'s members to obtain that redress. If the decision below is permitted to stand, however, government officials may with impunity impose upon the public their views as to "appropriate" First Amendment material — provided they couch their threats in calculating and discreet verbiage. Such a result does more than cripple the circulation of *Penthouse* magazine. It chills the free exercise of First Amendment rights and eviscerates the holding of *Bantam Books*. *Amici* urge this Court to clearly reaffirm *Bantam Books* in its broadest scope.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS MISCONSTRUED THIS COURT'S DECISION IN *BANTAM BOOKS, INC. V. SULLIVAN*, 372 U.S. 58 (1963)

On February 11, 1986, the Executive Director of the Attorney General's Commission on Pornography (the "Commission" or "Meese Commission") of the United States Department of Justice sent out a series of identical letters to 23 periodical distributors and retail chains (generally convenience store and drugstore chains) (a copy of one of these letters is attached as Exhibit A to this brief). The letters indicated that the addressee had been identified in testimony before the Commission as being "involved in the sale or distribution of pornography." Attached to the letter was a portion of the testimony before the Commission of Reverend Donald Wildmon (who was not identified), which repeatedly referred to petitioner's *Penthouse* magazine as pornographic and a "porn magazine." The letter offered the opportunity for the addressee to respond and disagree "prior to [the Commission's] drafting its final report section on identified distributors [of pornography]." *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1013 (D.C. Cir. 1991).

These letters were not the only scare tactic employed by the Commission. One member of the Commission personally called the general counsel of Southland Corporation to falsely assert that the Commission would link *Penthouse* and *Playboy* to child abuse. *Penthouse Int'l*, 939 F.2d at 1013. This assertion (not included in the Commission's final report) and the letters were instruments in an intentional effort by the Commission to intimidate distributors of *Penthouse* into discontinuing sales of the magazine. *See Playboy Enters., Inc. v. Meese*, 639 F. Supp. 581, 587 (D.D.C. 1986) ("it can be argued that the only purpose served by that letter was to discourage distributors from selling the publications"). Moreover, the Commission undertook this effort with the knowledge that *Penthouse* is not obscene under current legal standards,[2] and despite its understanding that "*governmental* condemnation may act effectively as governmental restraint." *Final Report* at 300 n.44 (referencing *Bantam Books*) (emphasis in original).

The Commission succeeded in its effort to intimidate the retailers. After receiving these letters, a number of Penthouse's largest distributors, including Southland (7-Eleven), Rite Aid Drug Stores, Revco, Thrifty Drug and Dart Drug, discontinued selling *Penthouse* magazine. The impact on distribution of *Penthouse* was severe, resulting in the loss of a substantial portion of its sales. The Commission achieved its goal of suppressing non-obscene, First Amendment protected material that some of its members (and Reverend Wildmon) found objectionable.

This result undermines the First Amendment. Similar results of similar actions by a state agency were vigorously condemned by this Court in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). In *Bantam Books*, the Rhode Island Commission to Encourage Morality

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[2] Indeed, whether *Penthouse* was legally obscene was of little concern to the Commission members. The Commission believed it had "both the right and the duty to condemn, in some cases, that which is properly constitutionally protected." *Attorney General's Commission on Pornography, Final Report* 300 n.44 (1986) (hereinafter "*Final Report*").

in Youth defended similar conduct on the grounds that the Commission was "limited to informal sanctions" (including "the threat of invoking legal sanctions and other means of coercion, persuasion and intimidation"), and therefore did "not regulate or suppress obscenity but simply exhort[ed] booksellers and advise[d] them of their legal rights." 372 U.S. at 66-67. This Court was not deceived, choosing to look "through forms to the substance." "The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication, *Lovell v. Griffin*, 303 U.S. 444, 452 [(1938)], and the direct and obviously intended result of the Commission's activities was to curtail the circulation in Rhode Island of books published by appellants." 372 U.S. at 65 n.6. Because "[p]eople do not lightly disregard public officers' thinly veiled threats . . . ," 372 U.S. at 68, the Court held that the Rhode Island Commission's system of informal censorship violated the Fourteenth Amendment.

As the district court in this case noted while granting injunctive relief, "[i]t hardly can be argued that the facts in *Bantam Books* and in the instant case are not similar." *Playboy Enters.*, 639 F. Supp. at 584-85. Despite the four-square precedent of *Bantam Books*, the Court of Appeals denied petitioner even the opportunity to prove its damages. It distinguished *Bantam Books* on the basis that the Meese Commission was not, by the terms of its enabling authority, specifically directed to recommend criminal enforcement. *Penthouse Int'l*, 939 F.2d at 1015. This distinction is inconsequential, and the exception to the *Bantam Books* doctrine proffered by the Court of Appeals should be rejected by this Court.

The form letter sent by the Meese Commission bears the indicia of the initial step on the road to prosecution. At the head it prominently bears the seal of the United States Department of Justice, well-known as the home of the federal prosecutor. On the right is the name of the "U.S. Department of Justice" and the designation that the Commission on Pornography belongs and is linked to the Attorney General — the federal government's chief prosecutor. The letter refers to alleged involvement in the sale or distribution of pornography. Finally, the letter states that "[f]ailure to respond will necessarily be accepted as an indication of no objection" to these allegations.

The federal courts have consistently applied the *Bantam Books* doctrine to such attempts to coerce the suppression of non-obscene material through the use of the indicia of prosecutorial authority. In a recent case involving similar coercive tactics, prosecutorial authorities in Alabama sent "informal invitations" on official letterhead to local retailers, stating that a task force had been investigating the sale of obscene materials, that the district attorney "would like to meet" with the retailers about magazines and books that "may be in violation of state obscenity laws," and that the retailers should call the police department and district attorney's office "to confirm your attendance at this meeting." *Council for Periodical Distribs. Ass'n v. Evans*, 642 F. Supp. 552, 555 (M.D. Ala. 1986), *aff'd*, 827 F.2d 1483 (11th Cir. 1987). The court saw through the informal form to the threatening substance, and found the letters unconstitutional. 642 F. Supp. at 565. The letters had achieved the desired result — many retailers discontinued selling *Playboy*, *Penthouse* and *New Look* magazines.

It is little wonder that Southland Corporation, Revco, Rite Aid, Thrifty Drug, Dart Drug and other businesses which received the Meese Commission's letters, while theoretically free to resist — as in *Bantam Books* and *Council for Periodical Distribs. Ass'n* — upon receipt of the letter chose to stop selling materials they knew to be protected. "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Bantam Books*, 372 U.S. at 68. The alternative was, at the least, public condemnation by a national commission headed by the federal government's chief law enforcement officer. At the worst, continued distribution threatened these businesspeople with prosecution, jail, ruin and lifelong stigma.[3] Not many drugstore and convenience store owners or chains would willingly place their livelihoods and reputations on the line to continue to sell *Penthouse*.

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[3] Among the recommendations promulgated by the Commission was that the Justice Department develop a special unit to enforce laws against sexually explicit materials and to aid state prosecutors in enforcing comparable state laws, *Final Report* at 436-37. In fact, the Justice Department has done so. *See, e.g., PHE, Inc. v. United States Dep't of Justice*, 743 F. Supp. 15 (D.D.C. 1990).

The fact that the Meese Commission's charter did not specifically empower the Commission to recommend criminal prosecutions was unknown to the recipients of the Commission's letters. Certainly, the letters did not say so. Nor did it really matter what the Commission's charter said. It was logical to assume that one agency of the Justice Department can and will refer matters to its sister divisions.

The position taken by the Court of Appeals that *Bantam Books* does not apply in the absence of an *explicit* threat of actual prosecution is a dangerous and inappropriate gloss on the First Amendment protection accorded by the *Bantam Books* doctrine. The *Bantam Books* majority looked "through forms to substance"; the court below overlooks substance for form.

II. GOVERNMENT THREATS INTENDED TO SUPPRESS PROTECTED EXPRESSION VIOLATE THE FIRST AMENDMENT

Amici's members have had a secure means of legal redress when confronted with attempts to blacklist them for engaging in expressive activities which are not obscene and therefore protected by the First Amendment. The federal courts have long recognized that threats of blacklisting, whether designated as such or labeled "legal advice" or "criticism," can be used by government officials to restrain protected speech. "It would be naive to credit the State's assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation independent of the laws against obscenity." *Bantam Books*, 372 U.S. at 68-69.

The court below, to the contrary, is serenely untroubled by the spectre of government blacklisting. "[T]his charge . . . says nothing more than that the Commission threatened to embarrass the distributors publicly." *Penthouse Int'l*, 939 F.2d at 1016. The Court of Appeals ignores the threat of impending sanctions implicit in the Commission's letter. More importantly, the Court of Appeals ignores the purpose of the threat, which was to suppress constitutionally-protected speech.

Oddly, the decision below instead categorizes the threat of blacklisting as part of the duties and among the rights of government officials. *See Penthouse Int'l*, 939 F.2d at 1016. The Court of

Appeals achieves that result by considering private threats of blacklisting as nothing more than "governmental criticism of the speech's content." In doing so, however, the court gravely misapprehends the nature of the Meese Commission's letter. The letter, written under the aegis of the Attorney General's office, threatened to publish a definitive report on the subject of pornography which would list mainstream drugstore and convenience store chains (all of which are heavily reliant on family business) as major distributors of "pornography." The Commission threatened calumny, not criticism.

The Meese Commission itself concedes that to "call something 'pornographic' is plainly, in modern usage, to condemn it. . . ." *Final Report* at 228. In the popular mind, "pornography" is synonymous with "obscenity" and, as such, carries overtones of criminality. Indeed, such an equation may even have been made by the author of the letter. At oral argument before the district court, "the defendants conceded that 'pornography' was not their word; rather it was the word of Reverend Wildmon. He does not define the word, and his written submission to the Commission demonstrates that he may very well equate 'pornography' with 'obscenity'." *Playboy Enters.*, 639 F. Supp. at 585.

The intended result of using the pejorative term "pornography" was to threaten a blacklist. "It must be borne in mind that the corporations receiving the letters included a number of drugstore chains and convenience store chains which greatly prize their family business. There is no question but that the suggestion that such organizations might be distributors of pornography was sensitive." *Playboy Enters., Inc. v. Meese*, 746 F. Supp. 154, 157 (D.D.C. 1990), *aff'd sub nom., Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011 (D.C. Cir. 1991). To avoid "run[ning] the risk of having themselves identified with pornography," 746 F. Supp. at 157, the distributors promptly discontinued selling the magazines. "[I]t seems more than ironic that many of the decisions not to sell were made *after the Commission's letters were sent out.*" *Playboy Enters.*, 639 F. Supp. at 585 (emphasis in original). Penthouse has demonstrated that retailers, fearing the public reaction to the condemnatory designation "pornography," drastically reduced the distribution of its publication. 639 F. Supp. at 585, 587-588.

The Circuit Court's analysis of the Commission's attempt to suppress the distribution of *Penthouse* and *Playboy* as a matter of the government's "right" of "vigorous criticism" is misleading. *Amici* do not dispute the right of members of the Meese Commission to criticize the content of *Playboy* and *Penthouse*. But by privately threatening to blacklist stores such as 7-Eleven, the Commission was not engaging in an "appeal to the public," or public speech at all. Rather, like a blackmailer, the Commission was privately threatening to destroy the reputation of mainstream businesses by associating them with a pejorative government label, and was implicitly threatening to prosecute them. The goal was *not* to engage in public criticism — in fact, no *public* criticism was made — but to suppress the protected expression with which Commission members and Reverend Wildmon disagreed. The private threats were thus a deliberate attempt to implement an informal system of prior restraint to suppress the distribution of non-obscene material. When the private threats achieved this unlawful aim, the Commission refrained from issuing the threatened blacklist.

Even if public criticism, rather than private blackmail, were the issue, it is beyond peradventure that the Commission's "right" and "duty" to "criticize" does not diminish the First Amendment protections embodied in *Bantam Books*. It is inconceivable that the government should assert First Amendment rights antagonistic to the interests of the larger community. This principle underlies many areas of our law,[4] but none so securely as the protection of First Amendment

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[4] For example, restraints are routinely placed on the rights of speech of government prosecutors. *See, e.g., Griffin v. California*, 380 U.S. 609, 615 (1965) ("the Fifth Amendment, in its direct application to the Federal Government . . . [forbids] comment by the prosecution on the accused's silence"). The speech of non-prosecutorial government officials is also restricted when antagonistic to the constitutional rights of the larger community. *See, e.g., Lombard v. Louisiana*, 373 U.S. 267 (1963) (city officials' public statements that blacks would not be permitted desegregated service in restaurants violated the Equal Protection Clause).

freedoms. Indeed, the speech in *Bantam Books* was as much "public criticism" as the speech here.

The court below principally relied on *Block v. Meese*, 793 F.2d 1303 (D.C. Cir. 1986), *cert. denied*, 478 U.S. 1021 (1987), to justify its lack of concern with the Commission's threat of blacklisting. This reliance is misplaced. *Block* and a related Supreme Court case, *Meese v. Keene*, 481 U.S. 465 (1987),[5] involved the Foreign Agents Registration Act ("FARA"), under which the Justice Department classifies films, registers distributees, and designates certain films as "political propaganda." *Keene* and *Block* held that labeling films "political propaganda" was not an act of blacklisting, because that designation is defined by statute in a non-condemnatory and not even particularly stigmatizing fashion. *Keene*, 481 U.S. at 483-85 (referring to 22 U.S.C. §§ 611-621); *Block*, 793 F.2d at 1311-12 (same). These distinctions are important: as we have discussed, "pornography" carries overtones of criminality and unquestionably would stigmatize drugstore and convenience store chains that rely on family business.

Moreover, in *Keene* and *Block* the Court and the District of Columbia Circuit concluded that labeling films furthered legitimate governmental purposes and was not motivated by a scheme to approve or condemn speech with the consequence of suppressing it. *Keene*, 481 U.S. at 484-85; *Block*, 793 F.2d at 1314. The trial court in this case found, however, that "the letter does not appear to be in furtherance of the work of the Commission. This being so, it can be argued that *the only purpose served by the letter* was to discourage distributors from selling the publications; a form of pressure amounting to an administrative restraint of the plaintiffs' First Amendment rights." *Playboy Enters.*, 639 F. Supp. at 587 (emphasis added).

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[5] The Court of Appeals decision relies heavily on *Block*, but pays scant attention to the more recent *Keene* case. Significantly, however, this Court in *Keene* pointedly avoided endorsing the broad language of *Block* with respect to the rights of government officials to "criticize" the speech of private citizens.

The court below cavalierly disregards the Commission's motivation. *Block* requires a closer analysis. "The line of permissibility, we think, falls . . . between the *disparagement* of ideas (general or specific) and the *suppression* of ideas through the exercise or *threat* of state power. If the latter is rigorously proscribed, *see Bantam Books* . . . , the former can hold no terror." *Block*, 793 F.2d at 1314 (emphasis added).

When the Attorney General, with all the panoply of his prosecutorial office, lends his authority to a man like Reverend Wildmon, whose stated goal is to "cripple" Playboy and Penthouse, *Penthouse Int'l*, 939 F.2d at 1013, few mainstream retailers will wait to see what is coming next. The drugstores and convenience stores pulled the plug on the magazines before the Justice Department pulled the plug on them. As in *Council for Periodical Distribs. Ass'n v. Evans*, "the words and deeds" of the Commission were calculated to and succeeded at provoking "retreat by those who dared to sell sexually explicit magazines." 642 F. Supp. at 563. Neither *Block* nor any other case sanctions such conduct.

III. THE DOCTRINE ENUNCIATED IN *BANTAM BOOKS* PROTECTS AGAINST GOVERNMENT ATTEMPTS TO INFORMALLY CENSOR PROTECTED EXPRESSION

Amici have learned from hard experience that government prosecutors, in their eagerness to attack the social harms some perceive to stem from the prevalence and accessibility of sexually related material, increasingly treat constitutionally protected but sexually frank books, periodicals and videos identically with materials which are obscene and not protected. Either because these prosecutors recognize that the sexually frank material they seek to suppress is not legally obscene, or because they recognize that their odds of actually obtaining a guilty verdict on obscenity charges is slim, they often employ informal schemes of suppression similar to that attempted by the Meese Commission. *Amici* and their members are legitimate, non-"adult" businesses, and for that reason are often targeted for prosecutorial intimidation aimed at eliminating constitutionally protected material because they are more vulnerable to "informal" intimidation than purveyors of hard-core pornography.

Whether the material targeted for suppression is *Playboy* magazine, a record album by risque rappers, or the multi-million bestselling guide *The Joy of Sex*, *amici* often have been compelled to seek shelter under the protective umbrella of *Bantam Books*. Fortunately for *amici*, other courts have been more alert than the court below to schemes to informally suppress protected speech. For example, when the Broward County, Florida sheriff's department began visiting record stores, presenting store managers with a "probable cause order" that a popular recording was obscene, and informally advising store managers to discontinue sales (which, within days, all record stores in the county did), a federal court intervened. The actions of the sheriff's department, the court found, subjected the recording "to an unconstitutional prior restraint and the plaintiffs' rights to publish presumptively protected speech were left twisting in the chilling wind of censorship." An injunction issued. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 600 (S.D. Fla. 1990).

In Colonial Heights, Virginia, police officers entered a Waldenbooks store and demanded that the manager remove *Playboy*, *Playgirl* and *Penthouse* magazines from the shelves, on pain of arrest and prosecution if she failed to comply. Walden Book Company sought an injunction under the *Bantam Books* doctrine, and ultimately obtained a consent decree and final judgment that town police would not "employ threats of prosecution or other informal enforcement methods to regulate the speech of plaintiffs. . . ." *Walden Book Co. v. City of Colonial Heights*, C.A. No. 89-424-R (E.D. Va. Aug. 23, 1989) (Consent Decree and Final Judgment). In Pittsburgh, the mayor wrote a letter threatening a massive sweep unless magazine and newsdealers agreed to stop selling a sexually oriented magazine. The district court, relying on *Bantam Books*, issued a permanent injunction against the mayor's misconduct. *American Civil Liberties Union v. City of Pittsburgh*, 586 F. Supp. 417 (W.D. Pa. 1984).

The Georgia Solicitor General orchestrated a series of warrantless arrests of newsstand operators selling magazines that arresting officers deemed obscene. The Fifth Circuit held that such action created an informal system of prior restraints and, relying on *Bantam Books*, sustained an injunction. *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980). When a North Carolina sheriff threatened prosecution of theatres exhibiting films with "R" or "X" ratings,

theatre owners sought the protection of the federal courthouse. Relying on *Bantam Books*, the Fourth Circuit found the "sheriff's method of informal censorship was an unconstitutional prior administrative restraint on free speech. . . ." *Drive-in Theatres, Inc. v. Huskey*, 435 F.2d 228, 230 (4th Cir. 1970). *See also Council for Periodical Distribs. Ass'n v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd*, 827 F.2d 1483 (11th Cir. 1987) (discussed *supra* at 8).

Of course, the federal courts' awareness of the dangers of "informal" suppression of speech did not originate with *Bantam Books*. *See, e.g., HMH Publishing Co. v. Garrett*, 151 F. Supp. 903, 904 (N.D. Ind. 1957) (prosecutor's conduct was an unconstitutional previous restraint when he prepared a list of publications he considered violative of the state's pernicious literature statute and, without actually threatening prosecution, transmitted this list to the attorney for a local magazine distributor, suggesting that "for the benefit of your client perhaps you might forward to him this list"). But *Bantam Books* has certainly provided the chief bulwark against such abuse. Even courts reluctant to deter "informal censorship" have felt obliged by the holding of *Bantam Books* to find such action to be an unconstitutional prior restraint. *See, e.g., Allied Artists Pictures Corp. v. Alford*, 410 F. Supp. 1348, 1354 (W.D. Tenn. 1976) ("Most reluctantly, but guided by the Supreme Court in [*Bantam Books*], the Court concludes that the actions of the Board under color of authority have operated, when viewed realistically, as a 'prior restraint'.").

Bantam Books protects speech even when a court order never issues. Parties similarly situated to *amici*'s members sought the assistance of the federal district court when an Ohio municipality wrote a local retailer, informing it that *Penthouse* and *Playboy* magazines were obscene and sales of the publications violated a village code. The case was settled on the agreement of the municipality not to undertake further action of that nature in the future. *Penthouse Int'l, Ltd. v. Laizure*, C88-4315A (N.D. Ohio) (Complaint filed Nov. 18, 1988).

Amici and its members are now in danger of losing a vital shelter for their First Amendment freedoms. The decision of the Court of Appeals eviscerates the *Bantam Books* doctrine. The opinion

effectively tells repressive groups within government, "speak softly, and you may carry a big stick." So long as prosecutors make no overt statement of intent to bring indictments, government threats against protected materials under the guise of "vigorous criticism" will be permitted to proceed.

That is not what *Bantam Books* means. That is not what the First Amendment means. *Amici* urge the Court to grant the petition for writ of certiorari to reaffirm these principles.

CONCLUSION

For the reasons set forth above, we respectfully urge that a writ of certiorari should issue to review and reverse the decision of the United States Court of Appeals for the District of Columbia Circuit.

February 21, 1992

Respectfully submitted,

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Attorney General's Commission on Pornography

Executive Director

Washington, D.C. 20530

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2828 North Haskell Avenue
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Authorized Representative :

The Attorney General's Commission on Pornography has held six hearings across the Unites States during the past seven months on issues related to pornography. During the hearing in Los Angeles, in October 1985, the Commission received testimony alleging that your company is involved in the sale or distribution of pornography. The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final report section on identified distributors.

You will find a copy of the relevant testimony enclosed herewith. Please review the allegations and advise the Commission on or before March 3, 1986, if you disagree with the statements enclosed. Failure to respond will necessarily be accepted as an indication of no objection.

Please call Ms. Genny McSweeney, Attorney, at (202) 724-7837 if you have any questions.

Thank you for your assistance.

Truly yours,

Alan E. Sears
Executive Director

enc: Self-Addressed
Postage Paid Mailing Label

EXHIBIT A